SUBJECT INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Statute Involved	4
Questions Presented	6
Statement of the Case	7
Specification of Errors to be Urged	10
Reasons for Granting the Writ	10
Conclusion	20
Appendix:	
Gross Receipts Tax Form	23
Opinions of Supreme Court of Pennsylvania in the Instant Case and in Shirks Motor Express Corporation v. Messner et al., and Interstate Motor Freight System, Inc. v. Messner, et al.	25

AUG 10 1955

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TABLE OF CASES CITED.

Page

Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U. S. 495 ..... 11, 18

Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 285 11

Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203 14

Bode v. Barrett, 344 U. S. 583 11

Bowman v. Continental Oil Co., 256 U. S. 642 16

Canton R. Co. v. Rogan, 340 U. S. 511 13

Capitol Greyhound Lines v. Brice, 339 U. S. 542 11

Central Greyhound Lines v. Mealey, 334 U. S. 653 ..... 11, 13

Clark v. Paul Gray, 306 U. S. 583 11

Clark v. Poor, 274 U. S. 554 11

Commonwealth v. Brinks, Inc., 346 Pa. 296, 30 A. 2d 128 14

Continental Baking Company v. Woodring, 286 U. S. 352 11

Hicklin v. Coney, 290 U. S. 169 11

Interstate Busses Corporation v. Blodgett, 276 U. S. 245 11

Interstate Transit v. Lindsey, 283 U. S. 183 ..... 11, 12, 15

McCarroll v. Dixie Greyhound Lines, Inc., 309 U. S. 176 ..... 11, 12, 15

Morf v. Bingaman, 298 U. S. 407 11

Morrill v. Jones, 196 U. S. 466 16

Railway Express Agency, Inc. v. Commonwealth of Virginia, No. 163, current term 11

Schechter v. United States, 295 U. S. 485 17

Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, 610 ..... 11, 12, 14, 15

Sprout v. South Bend, 277 U. S. 153 ..... 11, 12, 15

United States v. Eaton, 144 U. S. 677 16

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Constitution of Pennsylvania, Article V, Sections 1 and 3, Purdon's Pa. Statutes Annotated	3
Pennsylvania Act of June 22, 1931, P. L. 694, as amended by the Act of December 27, 1951, 72 Purdon's Pa. Statutes Annotated §§ 2183, 2184, 2185	3, 4, 5, 7
Pennsylvania Turnpike Act of May 21, 1937, Section 12, P. L. 774, 36 P. S. § 652l	9, 18
Pennsylvania Turnpike Philadelphia Extension Act of May 16, 1940, Section 15, P. L. (1941) 949, 36 P. S. § 653n	19
Western Pennsylvania Turnpike Extension Act of June 11, 1941, Section 15, P. L. 101, 36 P. S. § 654n	19
Pennsylvania Turnpike Extension Act of May 9, 1949, Section 15, P. L. 1037, 36 P. S. (pocket part) § 656.15	19
Pennsylvania Turnpike Delaware River Extension Act of May 23, 1951, Section 15, P. L. 335, 36 P. S. (pocket part) § 658.15	19
Pennsylvania Turnpike Northeastern Extension Act of September 27, 1951, Section 15, P. L. 1430, 36 P. S. (pocket part) § 660.15	19
Pennsylvania Turnpike Gettysburg Extension Act of January 14, 1951 (1952), Section 15, P. L. 1947, 36 P. S. (pocket part) § 667.15	19
17 Purdon's Pa. Statutes Annotated § 41	3
72 P. S. §§ 652o, 653q, 654q, 656.18, 658.18, 660.18, 667.18	20
28 U. S. C. § 1257 (3)	2

IN THE

Supreme Court of the United States.

October Term 1953

No. ——

SPECTOR MOTOR SERVICE, INC.,

Petitioner

v.

OTTO F. MESSNER, SECRETARY OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA, AND WELDON B. HEYBURN, AUDITOR GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Spector Motor Service, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania in the above-entitled cause, affirming the decree of the Court of Common Pleas of Dauphin County, Pennsylvania.

Opinions Below.

The opinion of the Court of Common Pleas of Dauphin County is not reported.

The opinion of the Supreme Court of Pennsylvania (R-13) is reported at 375 Pa. 473, 100 A. 2d 924. The order of the Supreme Court of Pennsylvania (R-22) denying petitioner's Petition for Reargument (R-14) is not separately reported.

The opinions of the Court of Common Pleas of Dauphin County in the companion cases, *Shirks Motor Express Corp. v. Messner et al.*, and *Interstate Motor Freight System, Inc. v. Messner et al.*, are reported at 63 Dauph. 383 and 63 Dauph. 405, respectively.

The opinion of the Supreme Court of Pennsylvania in these companion cases is reported at 375 Pa. 450, 100 A. 2d 913 and, together with the opinion in this case, is reproduced as an Appendix to this petition at pages 25, 26.

The companion cases are now before this Court on appeal from the Supreme Court of Pennsylvania under the captions *Shirks Motor Express Corp. v. Messner et al.*, and *Interstate Motor Freight System, Inc. v. Messner et al.*, at No. 615 and No. 606, respectively, of the current term.

Jurisdiction.

The judgment and opinion of the Supreme Court of Pennsylvania were filed on November 30, 1953 (R-13).

Petitioner's timely Petition for Reargument (R-14) was entertained by the Supreme Court of Pennsylvania and denied *per curiam* on December 30, 1953 (R-22). This petition for certiorari is being filed with this Court within ninety days of the latter date.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3):

(a) *Final Judgment.* The judgment of the Supreme Court of Pennsylvania (R-13) finally disposed of all legal issues raised by petitioner and that court refused to revise such disposition by denying petitioner's Petition for Reargument (R-22).

(b) *Highest State Court.* The Supreme Court of Pennsylvania is the highest court of that State in which a review of this decision could be had. See Sections 1 and 3, Article V, Constitution of Pennsylvania, Purdon's Pa. Statutes Annotated, and 17 Purdon's Pa. Statutes Annotated § 41.

(c) *Validity of State Statute Drawn in Question on Federal Constitutional Grounds.* In its Bill of Complaint filed in the trial court (R-2) petitioner specifically alleged (R-2, 3) that the Act of June 22, 1931, P. L. 694, as amended by the Act of December 27, 1951, is repugnant to the Commerce Clause of the Constitution of the United States in that it (1) attempts to levy a tax on the privilege of engaging in interstate commerce and not as compensation for use of the highways, (2) discriminates against interstate commerce, and (3) seeks to include in the tax base mileage over the Pennsylvania Turnpike for the use of which the State and its agencies are fully compensated by payment of tolls.

The Answer (R-8) filed by the Attorney General of Pennsylvania consisted entirely of Preliminary Objections denying that the tax is (1) one on the privilege of engaging in interstate commerce and not compensatory, or (2) discriminatory, or (3) improperly based in part on Turnpike mileage.

The Court of Common Pleas of Dauphin County, in dismissing petitioner's Bill of Complaint, relied on its own prior opinions in the companion *Shirks* and *Interstate* cases which are now before this Court on appeal, at No. 615 and No. 606 of the current term. In those opinions, that court held that the Commerce Clause does not invalidate this tax; that the challenged exaction "is a valid excise tax imposed as compensation for the privilege of using the highways in this State in interstate transportation"; that as applied to exclusively interstate carriers "the Act is constitutional"; and that "the route over the

Turnpike is and should be included in the apportionment formula". See Records in No. 615 and No. 606 now before this Court on appeal.[1]

In its Brief and argument to the Supreme Court of Pennsylvania, petitioner again urged that this statute provides for an invalid non-compensatory tax and that the administratively-created tax could not constitutionally be exacted from petitioner; and that, in any event, the tax base cannot constitutionally include Turnpike mileage for which the State and its agencies have been fully compensated.

The Supreme Court of Pennsylvania, relying on its opinion in the companion *Shirks* and *Interstate* cases, affirmed the decision of the Dauphin County Court despite petitioner's contrary contentions based on the Commerce Clause and decisions of this Court.

The opinion in these companion cases (Appendix to this petition, page 26) shows clearly that the foregoing questions of constitutionality under the Commerce Clause and the decisions of this Court were briefed, argued and decided in the Supreme Court of Pennsylvania.

Statute Involved.

The statute involved is the Pennsylvania Act of June 22, 1931, P. L. 694, as amended by the Act of December 27,

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1. In the *Shirks* case, the lower court also said:

"A motor carrier's route of operation is a very valuable and indispensable asset and is a most important factor in pruducing income. Where that route is certified by the Public Utility Commission or the Interstate Commerce Commission, *the carrier is the owner of a right that is protected from unregulated competition. The privilege of operating over such a route contributes directly to the income received from transportation over any part of the route."*

The court in discussing the amount of the tax, concluded that it is not excessive *"for the valuable privilege of operating in Pennsylvania over these certified and protected routes"*. The court also expressed the view that apportionment *"on the basis of route mileage within the State"* is a proper method of reaching the receipts of interstate carriers.

In the *Interstate* case, the court noted that the basis for computing the tax is a "comparison of routes within and without the State".

See records in No. 615 and 606.

1951, 72 Purdon's Pa. Statutes Annotated §§ 2183, 2184, 2185, providing in pertinent part as follows:

"An Act imposing a tax on gross receipts as an excise on the use of the public highways by certain owners or operators of motor vehicles transporting passengers and property for hire.

"Section 1. The word 'company,' as used in this act, shall be construed to mean any individual who, or copartnership, corporation, joint-stock association, or association of individuals whatsoever which, shall engage in the business of carrying passengers or property for hire over the highways of this Commonwealth in motor vehicles or trackless trolleys. For the purposes of this act, the term 'motor vehicle' shall be construed to mean every vehicle which is self-propelled, except such as move upon or are guided by a track erected upon the highways.

"Section 2. Each company shall pay an excise tax for the use of the highways of this Commonwealth. For the purpose of ascertaining the amount to be paid, each such company shall, on or before the first day of February, of each year, file with the Department of Revenue, on forms prescribed and furnished by it, a report, under oath or affirmation, setting forth: (1) The name and address of the company owning or operating such motor vehicle or vehicles; (2) the location of the principal place of business of such company; (3) the name and address of the person in this Commonwealth upon whom service of process or other notice may be had against such company; (4) a schedule, if any, or, if not, a description of *the routes over which such company shall have operated* over highways in this Commonwealth during the period for which the report is filed; (5) *the number of miles of all routes* over which such motor vehicle or motor vehicles shall have been operated by such company during the period for which

the report is filed; (6) the *number of miles within this Commonwealth of all such routes so operated* during the period for which the report is filed; and (7) the amount of gross receipts of such company from all sources upon its operations during the period for which the report is filed, and such other relevant information as the Department of Revenue may require in connection with the settlement of the excise tax hereinafter provided, for the calendar year immediately preceding the first day of January of each year.

"Section 3. The amount of excise tax annually to be paid by each company specified in section one of this act shall be as follows: (1) In case of a company operating routes which are entirely within the limits of this Commonwealth, eight (8) mills upon the dollar upon the gross receipts of such company from all operations for the period covered by such report; and (2) in case of a company operating over routes when only a part of such routes lies within this Commonwealth, eight (8) mills upon the dollar upon such portion of the gross receipts of such company as is represented by the ratio that *the number of miles of routes operated in this Commonwealth* by such company, during the period for which the report is filed, bears to *the total number of miles of all routes operated* by such company during said period. The provisions hereof shall not be construed as exempting any company from complying with the laws relating to fees payable to the Department of Revenue for the registration of motor vehicles." (All emphasis in this petition supplied.)

Questions Presented.

(1) In administering a state statute purporting to levy a "gross receipts tax" on interstate motor carriers, based on the proportion that the "number of miles of routes operated in this Commonwealth" bears to the "total num-

ber of miles of all routes operated", can a state administrative agency abandon that constitutionally objectionable formula and exact from an exclusively interstate motor carrier a "gross receipts tax" based, not on the above formula provided in the statute, but on its own administratively-created formula based on the proportion the "number of miles that was traveled within Pennsylvania" bears to the "total number of miles traveled interstate"?

(2) Assuming that such a tax can constitutionally be assessed by the state administrative agency, can the tax base constitutionally include mileage traveled on a toll road, for all of which mileage the exclusively interstate carrier pays tolls into a fund out of which all costs of every kind incurred by the State and its agencies have already been, or will be, paid?

Statement of the Case.

Petitioner is a Missouri corporation engaged in the business of transporting freight for hire, as a common carrier, pursuant to and solely by virtue of certain certificates of public convenience and necessity issued by the Interstate Commerce Commission.

Petitioner's routes traverse several states, including Pennsylvania. Some of its routes in Pennsylvania traverse parts of the Pennsylvania Turnpike, which is a toll road.

Petitioner is engaged exclusively in interstate commerce. It does not transport any freight in intrastate commerce in Pennsylvania.

Despite the exclusively interstate nature of petitioner's business, the Department of Revenue of that state asserted a claim against petitioner for $3,305.05, with interest, representing the amount allegedly due to the State as "Gross Receipts Tax" for the year 1951, under the Act of June 22, 1931, as amended December 27, 1951, 72 Purdon's Pa. Statutes Annotated §§ 2183-85.[2] The Department of Revenue

2. The relevant provisions of the statute are printed in full in the body of this petition under the heading "Statute Involved", *ante*, page 4.

also demanded that petitioner file a return and pay this tax for the year 1952.

All the above facts appear from petitioner's Bill of Complaint For An Injunction (R-2-7). For purposes of this case, they were admitted by the State's Answer Raising Preliminary Objections (R-8).

Those Preliminary Objections were sustained and petitioner's Bill of Complaint dismissed in the Final Decree of the trial court (R-14). That court did not write a separate opinion in petitioner's case. It referred to and relied upon its own prior opinions in the companion *Shirks* and *Interstate* cases, which are part of the records in No. 615 and No. 606, now before this Court on appeal from the Supreme Court of Pennsylvania.

On appeal, the Supreme Court of Pennsylvania affirmed the judgment of the trial court in all three cases. In the *Shirks* and *Interstate* cases, which had been consolidated on appeal, the court wrote an opinion in which the constitutional contentions of all three appellants (*Shirks, Interstate* and *Spector*) were rejected. Mr. Justice Bell dissented.

In petitioner *Spector's* case, the court wrote only a short *per curiam* opinion, referring to and relying upon the majority opinion in the *Shirks* and *Interstate* cases which was handed down simultaneously. (See Appendix to this petition, page 25.)

In the *Shirks* and *Interstate* opinion, which governs petitioner's case, the Supreme Court of Pennsylvania held:

(1) "Where a tax is imposed by a state upon carriers engaged in interstate commerce, it must affirmatively appear that it is levied only as compensation for use of the highways", and

(2) "Use of the highways can be ascertained only from the number of miles operated not from the physical layout of the routes. *We adopt as correct the construction given by the Department of Revenue* in administering the tax,

that is, *that the tax is based upon the number of miles operated, not the physical location and the extent of the routes.*" See Appendix hereto, page 29.

In its Petition for Reargument (R-15-20) petitioner pointed out to the Supreme Court of Pennsylvania that, in effect, it had held that (1) the apportionment formula specified *in the statute,* based on "number of *miles of routes operated*" in Pennsylvania compared to "the total number of *miles of all routes operated*", bears no relation to use of the highways and is therefore unconstitutional, but that (2) the Court will adopt as correct the "*construction* given by the Department of Revenue . . . that the tax is based on *number of miles operated* . . .", a phrase not mentioned anywhere in the statute.

Petitioner again emphasized to the State Supreme Court that this holding actually permits the Department of Revenue to levy and collect a tax *never enacted into law by any statute,* and in fact directly contrary to the plain and unambiguous words of the statute in question.

Petitioner also stressed (R-20-21) that Section 12 of the original Pennsylvania Turnpike Act of May 21, 1937, P. L. 774, 36 P. S. § 652l, and all relevant amendments thereto, provide that all charges and costs in connection with construction, operation and maintenance of the Turnpike must be paid "out of tolls". Consequently, the Commonwealth could not claim "compensation" for the use of that highway and, even if it be held that petitioner could constitutionally be subjected to the tax on a mileage basis, all Turnpike mileage must be excluded from the tax base because the Commonwealth has already been fully compensated for the use of that highway.

Despite the foregoing contentions, the Supreme Court of Pennsylvania denied petitioner's Petition for Reargument on December 30, 1953 and simultaneously denied a similar petition in the companion *Shirks* and *Interstate* cases now here on appeal at No. 615 and No. 606.

Specification of Errors to Be Urged.

The Supreme Court of Pennsylvania erred in the following respects:

(1) In ignoring the constitutional infirmities of the Act of June 22, 1931 by approving the Pennsylvania Department of Revenue's "construction" that the statutory formula based on "miles of routes operated" means "miles traveled".

(2) In approving inclusion in the alleged "compensation-for-use" tax base, mileage on a toll road for the use of which the state and its agencies have been fully compensated out of tolls paid by users, including petitioner.

(3) In holding that such an administratively-created tax not levied by any statute can be exacted from a foreign corporation engaged exclusively in interstate commerce and doing no intrastate business in Pennsylvania.

(4) In holding such an exclusively interstate carrier subject to this alleged "compensation-for-use" tax on mileage over a toll road, when all construction, operation and maintenance costs have been paid out of tolls collected from petitioner and other users thereof.

(5) In affirming the judgment of the trial court.

Reasons for Granting the Writ.

1. **The issue here presented—the extent of the state's power to tax interstate commerce, and especially the very means thereof—is one of such importance that this Court has rarely refused to review a state court decision upholding, over Federal constitutional objections, the application of a state tax to an exclusively interstate motor carrier. Moreover, this Court has stricken down such statutes unless it has been affirmatively shown that the tax in question is levied as compensation for use of the highways and is in fact related to actual highway use. This statute does not meet those tests.**

In a recent case involving this same petitioner, this Court emphasized that:

"In this field there is not only reason but long-established precedent for keeping the federal privilege of carrying on exclusively interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law—McCulloch v. Maryland, (U. S.) 4 Wheat. 316." *Spector Motor Service, Inc. v. O'Connor,* 340 U. S. 602, 610.

This Court's unfailing recognition of the importance of maintaining this principle as applied to interstate motor transportation, is reflected by the regularity with which such cases have been reviewed in recent years:

Clark v. Poor, 274 U. S. 554;
Interstate Busses Corporation v. Blodgett, 276 U. S. 245;
Sprout v. South Bend, 277 U. S. 163;
Interstate Transit v. Lindsey, 283 U. S. 183;
Continental Baking Company v. Woodring, 286 U. S. 352;
Hicklin v. Coney, 290 U. S. 169;
Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 285;
Morf v. Bingaman, 298 U. S. 407;
Clark v. Paul Gray, 306 U. S. 583;
McCarroll v. Dixie Greyhound Lines, 309 U. S. 176;
Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U. S. 495;
Central Greyhound Lines v. Mealey, 334 U. S. 653;
Capitol Greyhound Lines v. Brice, 339 U. S. 542;
Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602;
Bode v. Barrett, 344 U. S. 583.

And this Court now has before it the case of *Railway Express Agency, Inc. v. Commonwealth of Virginia,* at No. 163 of the current term, argued on January 5, 1954 and now awaiting decision.

In several of these cases this Court has invalidated state or local taxes because they either had no relation to actual highway use or were excessive in relation to the expenses for which reimbursement was allegedly sought or were in fact levied on the privilege of engaging in interstate commerce:

Sprout v. South Bend, 277 U. S. 153;
Interstate Transit v. Lindsey, 283 U. S. 183;
McCarroll v. Dixie Greyhound Lines, 309 U. S. 176;
Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602.

Recently enacted statutes, being more artfully and precisely drawn, have largely escaped invalidation. But the Pennsylvania statute here questioned was enacted in 1931 and shows no such signs of the later-developed legislative skill. Indeed, its formula based on "number of miles of *routes operated*" in Pennsylvania compared to "total number of miles of all *routes operated*" was so inartistic that it had to be *ignored* in the tax return form prepared by the Pennsylvania Department of Revenue in an attempt to save this part of the statute. The formula adopted for interstate carriers on that form is "number of miles that was traveled within Pennsylvania" compared to "total number of miles traveled interstate", which is totally different from the formula specified in the statute.[3] Compare the form, reproduced as Exhibit "A" hereto, with subparagraph (2) of Section 3 of the Act which is found under the heading "Statute Involved".

Obviously, the ratio of the "number of miles of routes operated in this Commonwealth" to "the total number of miles of all routes operated" does not reflect actual highway use in Pennsylvania.[4] Both the Commonwealth and the Supreme Court of Pennsylvania admitted this.

3. It should be noted that throughout the opinion of the Supreme Court of Pennsylvania that court discusses the formula which appears on the *tax return form*, not the totally different formula which appears in *the statute*.

4. The railroad cases have no relevance here: (1) railroads do not use state highways and state taxes on railroads are neither based on use of state-

Furthermore, the amount of such a tax would increase as the carrier's out-of-state business increased, because the fixed ratio would be applied to the carrier's greater receipts, irrespective of whether the Pennsylvania mileage increased or decreased. In any year in which *any* routes in Pennsylvania were operated *even once,* this statute would tax an interstate carrier without regard to its actual use of Pennsylvania's highways and in fact on income earned wholly outside Pennsylvania.

The infirmity of the statutory formula is also demonstrated by the fact that the statute provides for application of the "miles of routes operated" ratio to the "gross receipts" of the carrier—which would include receipts from *all* operations, whether wholly outside Pennsylvania or partly within and partly without that state.[5] Here, too, the

owned and state-provided facilities nor limited to that type of tax; (2) obviously a railroad acquires a right-of-way, builds stations and other facilities, and lays tracks only where it is reasonably certain that such expenses will bear some relation to the income earned, so that the "miles-of-line" ratio is reasonable and is based on the railroads own business judgment.

Canton R. Co. v. Rogan, 340 U.S. 511, is especially inapposite here: that case involved a franchise tax levied on a domestic corporation doing intrastate business and "operating entirely within the City of Baltimore, Maryland", 340 U.S. 511, 512. As to such a corporation, even the *Spector* decision, 340 U.S. 602, would permit an apportionment based on comparison of lines within the State with total lines operated: "Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate." 340 U.S. 602, 610.

Moreover, *Central Greyhound Lines v. Mealey,* 334 U.S. 653, cited in the *Canton* case in reply to Commerce Clause objections, upheld a New York gross receipts tax on a domestic corporation engaged as a motor carrier (between points in New York State but passing through parts of Pennsylvania) only to the extent of *actual miles traveled in New York* and *not miles of routes operated* in that state.

5. This evidences a legislative purpose to apply the tax to the same proportion of the interstate carrier's gross receipts as the ratio of "miles of routes operated within this Commonwealth" to "total number of miles of all routes operated" by the carrier. In addition to having no relation to the carrier's actual use of Pennsylvania highways, this would make the tax one based on the value of the right to conduct an interstate business in Pennsyl-

Department of Revenue abandoned the statute and substituted its own formula—its "miles traveled" ratio is to be applied to "total gross receipts from interstate operations", which are defined to include only "trips partly inside and partly outside Pennsylvania". See Items 6(b) and 6(c) of Gross Receipts Tax Report reproduced at Appendix "A", page 23 of this petition.

Thus, the statute here presented is one specifying a taxing formula for use by interstate carriers which (1) is not related to or based on actual use of Pennsylvania highways, and (2) is designed to and will reach revenue earned outside Pennsylvania.

This Court cannot, consistently with its treatment of prior cases involving challenged taxes of this kind, deny review of these important issues.

2. The Supreme Court of Pennsylvania admitted that "use of the highways can be ascertained only from the number of miles operated", and not the length of the routes. Although the statute mentions only "miles of routes operated", the state court approved the Department of Revenue's abandonment of that formula and its substitution of an administratively-created formula based on "miles traveled". A tax based on such a formula has no basis in any statute and is therefore clearly unconstitutional.

The statute, as written, specifies a formula for use by interstate [6] carriers which both the Attorney General and

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vania and therefore invalid under all the cases from at least *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, to *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602. But the tax here challenged is invalid because not based on actual highway use and this Court need not reach the question whether it is also invalid because levied on the privilege of engaging in interstate commerce.

6. The State Supreme Court's erroneous view of the *"miles of routes operated"* formula prescribed by the statute for use by interstate carriers is shown by its citation of *Commonwealth v. Brinks, Inc.*, 346 Pa. 296, 30 A. 2d 128. The *Brink's* case has no relevance here. Brinks was engaged exclusively in *intrastate* commerce, 34€ Pa. 304, and was taxable on its gross receipts "from all operations", under sub-paragraph (1) of Section 3 of the statute. As to *Brink's*, therefore, it was immaterial whether it operated on routes or

the State Supreme Court admit has no relation to actual highway use. That formula provides for a comparison of the "number of *miles of routes operated*" in Pennsylvania with the "total number of *miles of all routes*" operated by the carrier.

The Attorney General in his brief to the State Supreme Court, which has been certified to this Court at petitioner's request, states at page 3:

> "The use of highways is measured by the number of miles operated or traveled. The length of a particular route would not indicate the **use** thereof. The total number of miles operated and so used might be greater for a short route than for a long route. **Use** of a highway depends upon the number of miles traveled."

And:

> "The employment of miles traveled in the ratio provides a fair measure of the use of the highway. The physical route may be long, but it may be traveled little or none at all." (Page 5)

Similarly, the Supreme Court of Pennsylvania said:

> "Use of the highways can be ascertained only from the number of miles operated, not from the physical layout of the routes. We adopt as correct the construction given to the statute by the Department of Revenue in administering the tax, that is, that the tax is based upon the number of miles operated, not the physical

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not. And the State Supreme Court so held. But as to an exclusively *interstate* carrier such as Petitioner, sub-paragraph (2) of Section 3 of the statute requires use of the ratio of the "number of miles of routes" operated in the Commonwealth to the "total number of miles of all routes operated by such company" during the tax year. 72 P. S. § 2185. Thus, neither the meaning nor the validity of the "miles of routes" formula was involved in *Brinks*, but both are involved here.

Moreover, as to an exclusively *intrastate* carrier such as Brink's, even a tax on the privilege of doing business and based on gross receipts from "all operations" would be valid; but as to petitioner, a foreign corporation engaged exclusively in interstate commerce, the tax is bad if a privilege tax, *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, or if not related to actual highway use, *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176; *Interstate Transit v. Lindsey*, 283 U.S. 183; *Sprout v. South Bend*, 277 U.S. 163.

location and extent of the routes. Cf. *Commonwealth v. Brinks, Incorporated,* 346 Pa. 396, 30 A. 2d 123."[7]

Thus both the Attorney General and the State Supreme Court agree that number of miles of routes operated—*the only formula found in the statute*—has no relation to actual highway use. But, since this fact would render the Act unconstitutional,[8] the Department has substituted another and totally different formula. Similarly, the statutory definition of taxable receipts has been abandoned and another administratively-created definition substituted.

Can an administrative agency scrap an unconstitutional taxing formula provided by statute and then levy a tax of its own, which has no basis in any statute?

At least as long ago as *Morrill v. Jones,* 106 U. S. 466, this Court held that taxing authorities cannot "by regulation alter or amend a revenue law." See also *United States v. Eaton,* 144 U. S. 677. And, with respect to such attempts by state agencies to cure a state statute of this kind this Court long ago said:

> "No doubt the State *might* impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. *But the State has not done this by any act of Legislation.* Its executive and administrative officials has disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that . . . the license tax cannot be enforced at all without interfering with interstate commerce *unless it be enforced otherwise than as prescribed by the statute—that is to say, without authority of law. Hence, it cannot be enforced at all." Bowman v. Continental Oil Co.,* 256 US 642, 648.

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7. See note 6.

8. Without regard to the fact that the *statute* would also reach income earned outside Pennsylvania.

This Court has repeatedly held that, even in regulatory statutes entrusting enforcement and administration to administrative agencies, definite standards and limitations must be specified by the *legislature* and can not be established by the administrative agencies. *Schechter v. United States,* 295 US 485. *A fortiori,* a *tax* must be levied by the legislature, and no administrative agency can arrogate the taxing power unto itself. Here the state Department of Revenue has abandoned the statute and levied a tax based on (1) its own, and not the legislature's, ratio, and (2) its own, and not the legislature's, definition of taxable receipts.

This Court should review the Pennsylvania Supreme Court's decision upholding this lawless conduct by an administrative agency, especially when the effect of denying review would be to subject all forms of interstate commerce to taxation at the whim of the administrative agencies of each of the forty-eight states.

3. Even if the Pennsylvania Department of Revenue's "construction" be deemed effective to save this statute, Pennsylvania cannot possibly claim "compensation for use" with respect to the Turnpike. Under its own statutes, the state has required that highway users pay tolls sufficient to reimburse both the state and its agencies for all construction, operation and maintenance expenses in connection with the Turnpike. As to such mileage, no tax of any amount can be exacted as "compensation for use". This issue, standing alone, is sufficiently important to justify review by this Court, especially in view of the well-known trend to toll roads.

This Court has consistently held that a state tax on exclusively interstate motor carriers is invalid unless it is levied as compensation for use of the state's highways and bears some reasonable relation to actual highway use. That this rule is now firmly established is shown by the emphasis placed upon it in one of this Court's rare unanimous decisions in the field. *Aero Mayflower Transit Co. v. Board of*

Railroad Commissioners, 332 U. S. 495. In each case, it must be determined whether the challenged tax meets these standards.

As to mileage over the Pennsylvania Turnpike, which the state seeks to include in petitioner's tax base, petitioner earnestly contends that the state cannot possibly have any claim for "compensation-for-use" because, under the state's own statutes, all construction, operation and maintenance costs of that highway *must* be paid out of tolls collected from petitioner and other Turnpike users.

Exclusion of revenue derived from such mileage is required by the provisions of the original Turnpike Act, as well as later similar statutes, which provide that *not only the entire original cost of construction but also the cost of maintenance, repairing and operating the Turnpike and its extensions shall be paid out of the tolls and other revenues derived from the Turnpike.* Since all costs of building and operating the Turnpike are thus paid out of tolls paid by petitioner and others, there is no item of cost or expense for which the Commonwealth could be "compensated" by petitioner, and no "compensatory" tax can be exacted for use of the Turnpike or its extensions.

Section 12 of the original Turnpike Act of May 21, 1937, P. L. 774, 36 P. S. § 652*l*, provides in pertinent part as follows:

> "*The turnpike when completed and opened to traffic shall be maintained and repaired by and under the control of the commission through the Department of Highways of the Commonwealth, and all charges and costs for such maintenance and repairs actually expended by said Department of Highways shall be paid to it by the commission upon certification thereof, out of tolls* . . .
>
> "The commission is hereby authorized to *fix and revise from time to time tolls for the use of the turnpike* and the different parts or sections thereof, *and to*

charge and collect the same . . . Such tolls shall be so fixed and adjusted as to provide a fund at least sufficient with other revenues of the turnpike, if any, to pay—(a) *the cost of maintaining, repairing and operating the turnpike;* and (b) the bonds and the interest thereon, and all sinking fund requirements, and other requirements . . . as the same shall become due . . . *The tolls . . . except such part thereof as may be required to pay the cost of maintaining, repairing and operating the turnpike and to provide such reserves therefor as may be provided for in the resolution authorizing the issuance of the bonds or in the trust indenture,* shall be set aside at such regular intervals as may be provided in such resolution or such trust indenture, in a sinking fund . . ."

Nothing could be clearer. The "cost of maintaining, repairing and operating the turnpike" is to be *paid out of the tolls collected for use of the Turnpike,* and any moneys expended for that purpose by the State Department of Highways are required by law to be *repaid out of the tolls.*

As to Turnpike Mileage, how can the Commonwealth possibly claim a right to this tax as "compensation for use of the highways"?

The point need not be labored, because a mere reading of the statutes suffices.[9] Each statute specifically provides that the tolls can be applied to payment of interest and retirement of bonds only *after* payment of "the cost of main-

9. See Section 15 of the "Pennsylvania Turnpike Philadelphia Extension Act" of May 16, 1940, P.L. (1941) 949, 36 P.S. § 653n;

Section 15 of the "Western Pennsylvania Turnpike Extension Act" of June 11, 1941, P. L. 101, 36 P. S. § 654n;

Section 15 of the "Pennsylvania Turnpike Extension Act" of May 9, 1949, P.L. 1037, 36 P.S. (pocket part) § 656.15;

Section 15 of the "Pennsylvania Turnpike Delaware River Extension Act" of May 23, 1951, P.L. 335, 36 P.S. (pocket part) § 658.15;

Section 15 of the "Pennsylvania Turnpike Northeastern Extension Act" of September 27, 1951, P.L. 1430, 36 P.S. (pocket part) § 660.15;

Section 15 of the "Pennsylvania Turnpike Gettysburg Extension Act" of January 14, 1951 (1952), P.L. 1947, 36 P.S. (pocket part) § 667.15.

taining, repairing and operating the turnpike" *and* provision for "such reserves therefor as may be provided for in the resolution . . . or in the trust indenture . . ." Indeed, by the very words of the Turnpike Acts, *only after the bonds and interest thereon have been paid or provided for* shall the Turnpike "become a part of the system of State highways." See 72 P. S. §§ 652o, 653q, 654q, 656.18, 658.18, 660.18, 667.18. Certainly until the Turnpike becomes a "part of the system of State highways", the State has no right to levy a tax on the use thereof, especially when it is levied in addition to the tolls.

This issue, standing alone, justifies and requires review by this Court, especially in view of the well-known trend to toll roads such as the Pennsylvania Turnpike. See "Toll Road Boom", page 50, "Nation's Business", March, 1954, stating (at page 54) that "present and proposed toll road mileage now totals 8,722", excluding proposed north-south and east-west transcontinental superhighways, of which toll roads "would be an important part." This issue will be raised in every state which constructs or includes any part of such toll roads. It should be decided now by this Court for the guidance of all the states and the numerous private parties concerned.

Conclusion.

For each of the foregoing reasons, petitioner submits that a writ of certiorari should issue, to the end that the judgment of the Supreme Court of Pennsylvania may be reversed.

Respectfully submitted,

James M. Marsh,
J. Harry LaBrum,
Counsel for Petitioner.

Of Counsel:

Conlen, LaBrum & Beechwood,
1507 Packard Building,
Philadelphia 2, Pennsylvania.

Appendix.

Form RCGR-1d—50M—6-52 [redacted]-10

IMPORTANT

GROSS RECEIPTS TAX REPORTS MUST BE FILED ON OR BEFORE FEBRUARY 1 FOR THE TWELVE MONTHS ENDED DECEMBER 31 IMMEDIATELY PRECEDING

FOR FAILURE TO FILE REPORT WHEN DUE, A PENALTY WILL BE ADDED TO THE TAX IN THE AMOUNT OF 10% ON THE FIRST $1000 OF TAX, 5% ON THE NEXT $4000 OF TAX, AND 1% ON EVERYTHING IN EXCESS OF $5000.

COMMONWEALTH OF PENNSYLVANIA

GROSS RECEIPTS TAX REPORT

OPERATORS OF MOTOR VEHICLES FOR HIRE

For 12 Months Ended _____ 19____

(PRINT PLAINLY BELOW NAME AND BUSINESS ADDRESS)

_____
(Name)

_____
(Number and Street)

_____
(Post Office and State)

PAYMENT OF TAX

THIS TAX MUST BE PAID WHEN THIS REPORT IS DUE.

FILL IN TRANSMITTAL SLIP

ATTACH REMITTANCE TO THE ORDER OF THE COMMONWEALTH OF PENNSYLVANIA AND FILE THIS REPORT WITH PENNSYLVANIA DEPARTMENT OF REVENUE HARRISBURG, PENNSYLVANIA

To the Commonwealth of Pennsylvania, Department of Revenue, Harrisburg, Pennsylvania.

In compliance with the Act of June 22, 1931, P. L. 694, and the Act of February 2, 1937, P. L. 3, as amended the following report is made of the Gross Receipts by the above-named company for the period mentioned above:

1. This business is a corporation, partnership, association, or individual (State which) _____

2. The principal place of business of the above-named is _____
(Number and Street) (Post Office) (State)

3. The name and address of the person within this Commonwealth upon whom service of process or other notice may be had is _____
(Name) (Number and Street) (Post Office)

4. Following is a schedule or description of routes operated within this Commonwealth during the period covered by this report. (If no fixed routes were operated, state so here, and describe the general character of the transportation conducted, whether taxi, draying, trucking, moving, etc.)

_____

_____

_____

COMPUTATION OF TAX BY TAXPAYER

5. INTRASTATE OPERATIONS

a. Number of miles traveled Intrastate, that is, on trips wholly within Pennsylvania during this 12 months period ..... _____ Miles

b. Total Gross Receipts from this Intrastate mileage ..... $ _____

Less Gross Receipts received for carrying United States mail on these intrastate trips ..... _____

Intrastate Gross Receipts taxable ..... $ _____

Eight (8) Mills Tax ..... × .008

Tax on Intrastate Gross Receipts at Eight Mills ..... $ _____

6. INTERSTATE OPERATIONS

a. The number of miles that was traveled within Pennsylvania ..... _____ Miles

b. Total number of miles traveled Interstate, that is on trips partly inside and partly outside Pennsylvania ..... _____ Miles

c. Total Gross Receipts from Interstate operations, that is, from the entire mileage shown in 6b. ..... $ _____

Less Gross Receipts received for carrying United States mail on interstate trips .... _____

2. The principal place of business of the above-named is .....
(Number and Street) (Post Office) (State)

3. The name and address of the person within this Commonwealth upon whom service of process or other notice may be had is .....

.....
(Name) (Number and Street) (Post Office)

4. Following is a schedule or description of routes operated within this Commonwealth during the period covered by this report. (If no fixed routes were operated, state so here, and describe the general character of the transportation conducted, whether taxi, draying, trucking, moving, etc.)

.....

.....

.....

COMPUTATION OF TAX BY TAXPAYER

5. INTRASTATE OPERATIONS

a. Number of miles traveled Intrastate, that is, on trips wholly within Pennsylvania during this 12 months period ..... _____ Miles

b. Total Gross Receipts from this Intrastate mileage ..... $ _____

Less Gross Receipts received for carrying United States mail on these intrastate trips ..... _____

Intrastate Gross Receipts taxable ..... $ _____

Eight (8) Mills Tax ..... × .008

Tax on Intrastate Gross Receipts at Eight Mills ..... $ _____

6. INTERSTATE OPERATIONS

a. The number of miles that was traveled within Pennsylvania ..... _____ Miles

b. Total number of miles traveled Interstate, that is on trips partly inside and partly outside Pennsylvania ..... _____ Miles

c. Total Gross Receipts from Interstate operations, that is, from the entire mileage shown in 6b. ..... $ _____

Less Gross Receipts received for carrying United States mail on interstate trips .... _____

Interstate Gross Receipts for tax calculation ..... $ _____

d. The portion of the Interstate Gross Receipts derived from that part of the Interstate mileage which was within Pennsylvania, calculated as follows:

$$\frac{\text{The number of miles in 6a.}}{\text{The number of miles in 6b.}} \times \text{Interstate Gross Receipts for tax calculation}$$

or $\frac{\text{Miles}}{\text{Miles}} \times \$_____ = \$_____$

Eight (8) Mills Tax ..... × .008

Tax on proper portion of Interstate Gross Receipts .....

TOTAL TAX ..... $ _____

Penalty (For failure to file report within time limit prescribed by law) .....

.....

AMOUNT DUE COMMONWEALTH ..... $ _____

7. REMITTANCE HEREWITH TO ORDER OF COMMONWEALTH OF PENNSYLVANIA ..... $ _____

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT.

SPECTOR MOTOR SERVICE, INC., *Appellant,*

v.

OTTO F. MESSNER, Secretary of Revenue of the Commonwealth of Pennsylvania, and WELDON B. HEYBURN, Auditor General of the Commonwealth of Pennsylvania.

No. 29 May Term, 1953.

Appeal from Final Decree of the Court of Common Pleas of Dauphin County, at No. 2060 Equity Docket, No. 31, Commonwealth Docket, 1953.

OPINION OF THE COURT.

Filed November 18, 1953.

PER CURIAM.

Spector Motor Service, Inc., a foreign corporation engaged in an interstate trucking business, contends that the Act of June 22, 1931, P. L. 694, as amended by the Act of December 27, 1951, P. L. 1761, 72 PS § 2185 et seq., is unconstitutional as applied to it for all of the reasons which were alleged by Shirks Motor Express Corporation and Interstate Motor Freight System, Inc. in similar proceedings and appeals at No. 22 May Term, 1953 and at No. 25 May Term, 1953, respectively. The three appeals were heard by us at the same sitting. This appellant makes no argument or contention which differs from those presented and considered by us in the companion *Shirks* and *Interstate* cases, opinion and order in which were this day filed. For the reasons stated in those cases, the decree of the court below is affirmed at the cost of appellant.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT.

SHIRKS MOTOR EXPRESS CORPORATION, *Appellant,* v. OTTO F. MESSNER, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania, and WELDON B. HEYBURN, Auditor General of the Commonwealth of Pennsylvania.	No. 22 May Term, 1953. Appeal from the Judgment of the Court of Common Pleas of Dauphin County at No. 2015 Equity Docket, Commonwealth Docket No. 34, 1952.
INTERSTATE MOTOR FREIGHT SYSTEM, INC., *Appellant,* v. OTTO F. MESSNER, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania, and WELDON B. HEYBURN, Auditor General of the Commonwealth of Pennsylvania.	No. 25 May Term, 1953. Appeal from the Judgment of the Court of Common Pleas of Dauphin County at No. 2024 Equity Docket, Commonwealth Docket No. 94, 1952.

OPINION OF THE COURT.

Filed November 17, 1953.

CHIDSEY, *J.*

The appellants, Shirks Motor Express Corporation and Interstate Motor Freight System, Inc., filed separate bills in equity against the Secretary of Revenue and the

Auditor General of the Commonwealth of Pennsylvania to enjoin them from enforcing the Act of June 22, 1931, P. L. 694, as amended by the Act of December 27, 1951, P. L. 1761, 72 PS § 2185 et seq., which imposes an excise tax on the gross receipts of common carriers by motor vehicle, on the ground that the Act, as amended, violates the Commerce Clause, the Equal Protection Clause and the Due Process Clause of the United States Constitution, and also violates certain provisions of the Pennsylvania Constitution. The defendants filed preliminary objections in the nature of a demurrer, which in each case were sustained, and the respective complaints dismissed.

Shirks Motor Express Corporation is a Delaware corporation registered to do business in Pennsylvania. It is engaged in the business of transporting property by motor vehicle as a common carrier. It is engaged in interstate transportation, pursuant to certificates issued by the Interstate Commerce Commission, over various routes and between various points in seven States, including Pennsylvania. It is also engaged to a limited extent in intrastate transportation, pursuant to a certificate issued by the Pennsylvania Public Utility Commission, over certain routes within Pennsylvania.

Interstate Motor Freight System, Inc. is a Michigan corporation. It is a common carrier engaged solely in interstate transportation of property by motor vehicles, pursuant to certificates issued to it by the Interstate Commerce Commission. It operates over various routes and between various points in fifteen States, including Pennsylvania. This plaintiff's bill in equity substantially duplicates the bill of Shirks Motor Express Corporation, but also alleges that the tax is unconstitutional because it is levied upon transportation over the Pennsylvania Turnpike, a State instrumentality, for which tolls are charged.

Both appellants pay to the Commonwealth taxes for liquid fuels and registration fees on their vehicles.

Appellants attack the constitutionality of the statute involved on many fronts. Their contentions may be roughly subdivided into two groups: (1) those aimed solely at the amendatory Act of 1951, and (2) those aimed at those portions of the original Act of 1931 which were not affected by the 1951 amendment.

In its original form the Act of 1931 imposed a tax of 8 mills on each dollar of the gross receipts of motor carriers as an excise for the use of the public highways. Intrastate carriers were required to pay eight mills of the gross receipts from all operations and interstate carriers were required to pay ". . . eight (8) mills upon the dollar upon such portion of the gross receipts of such company as is represented by the ratio that the number of miles of routes operated in this Commonwealth by such company, during the period for which the report is filed, bears to the total number of miles of all routes operated by such company during said period." The original Act also provided for credits against the amount of the tax for any tax paid to a city for the use of its highways and for registration fees paid to the Commonwealth. The Act of 1931 further provided that the tax receipts collected from interstate carriers should be paid into the Motor License Fund, while tax receipts collected from intrastate carriers should be paid into the General Fund of the Commonwealth. The Act of 1951 made two changes, (1) it eliminated the credit for payment of local taxes and registration fees, and (2) it provided that *all* tax receipts be paid into the General Fund.[1]

Appellants' first contention is that the Act of 1931, as amended, violates the Commerce Clause (Article I, Section 8) of the United States Constitution. Appellants' contention is based in part upon their construction of the above quoted portion of the statute to mean that the trucking companies are taxed upon the basis of physical location and

1. Thus tax receipts from intrastate carriers continued to be paid into the General Fund.

extent of routes rather than miles operated. Such a construction is unwarranted. The title of the Act provides: "Imposing a tax on gross receipts as an excise on the *use* of the public highways by certain owners or operators of motor vehicles transporting passengers and property for hire." (Emphasis supplied). Use of the highways can be ascertained only from the number of miles operated, not from the physical layout of the routes. We adopt as correct the construction given to the statute by the Department of Revenue in administering the tax, that is, that the tax is based upon the number of miles operated, not the physical location and the extent of the routes. Cf. *Commonwealth v. Brinks, Incorporated,* 346 Pa. 296, 30 A. 2d 128.

It is well settled that a State does not have the power to tax interstate commerce as such: *Alpha Portland Cement Company v. Commonwealth of Massachusetts,* 268 U. S. 203; *Spector Motor Service, Inc. v. O'Connor, Tax Commissioner,* 340 U. S. 602. It is equally well settled that a State may, consistently with the Commerce Clause, impose upon vehicles engaged in interstate commerce a reasonable, nondiscriminatory tax as compensation for the use of its highways: *Dixie Ohio Express Co. v. State Revenue Commission et al.,* 306 U. S. 72; *Hendrick v. State of Maryland,* 235 U. S. 610; *Capitol Greyhound Lines et al. v. Brice, Commissioner of Motor Vehicles,* 339 U. S. 542. Both appellants and appellees concede these fundamental propositions, but disagree as to their application to the statute here involved.

Where a tax is imposed by a State upon carriers engaged in interstate commerce it must affirmatively appear that it is levied only as compensation for the use of its highways. This limitation upon the taxing power of a State has not been violated where the taxing statute discloses that the incidence of the tax is apportioned to the use of the State's highways *or* where the proceeds of the tax are apportioned directly or indirectly to highway purposes: *Clark et al. v. Poor et al.,* 274 U. S. 554; *Interstate Transit, Incorporated*

v. Lindsey, County Court Clerk, 283 U. S. 183; *Morf v. Bingaman, Commissioner of Revenue for New Mexico,* 298 U. S. 407; *Aero Mayflower Transit Co. v. Board of Railroad Commissioners of Montana et al.,* 332 U. S. 495 (1947), and cases cited therein. This is merely another way of stating the rule previously referred to, that is, that the tax is for the purpose of compensating the State for the use of its highways. Where the proceeds of the tax are allocated directly or indirectly for highway uses, there can be no doubt that the purpose of the tax is compensation for the use of the highways. *Where the amount of the tax is reasonable and non-discriminatory, and apportioned so as to reflect the use of a State's highways, a State does not abdicate its right to exact compensatory taxes from vehicles engaged in interstate commerce because the proceeds of the tax are placed in a general fund, as was done in the instant case, rather than in a highway fund.* If appellants' argument were adopted, vehicles engaged in interstate commerce, which contribute largely to the depreciation of the highways, would pay only the motor fuel tax and registration fees, while similar carriers engaged in intrastate commerce, would, in addition, be subject to this excise tax. An interstate carrier may not base a constitutional objection solely upon the use made of the proceeds of the tax. This is a matter for the exclusive determination of the Legislature. If the tax is otherwise constitutional, the use to which the proceeds of the tax are allocated will not render it unconstitutional: *Morf v. Bingaman,* supra, at p. 412; *Aero Mayflower Transit Co. v. Commissioner,* supra; *Clark v. Poor,* supra; *Dixie Ohio Co. v. State Revenue Commissioner,* supra.[2] None of the cases cited by the appellants holds otherwise.

2. In *Morf v. Bingaman,* 298 U. S. 407, Mr. Justice Stone said at p. 412: ". . . The use for highway maintenance of a fee collected from automobile owners may be of significance, when the point is otherwise in doubt, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways. Interstate Transit, Inc. v. Lindsey, supra. But where the manner of the levy, like that prescribed by the present statute, definitely identifies it is a fee charged for the grant of the privilege, it is

Under the principles above set forth it is necessary to determine whether the formula set forth in the Act of 1931, as amended by the Act of 1951, is reasonably calculated to impose the tax only on that portion of the operation of interstate carriers which is effected by the use of highways within the Commonwealth of Pennsylvania, and whether the tax is nondiscriminatory and reasonable in amount. The numerator of the tax formula is the number of miles operated in Pennsylvania. The denominator is the total number of miles operated. The multiple is the gross receipts of the carrier from all of its operations. The tax of eight mills is imposed upon the result of this calculation. The statute under consideration provides a reasonably accurate and nondiscriminatory formula to reflect the use of highways within this Commonwealth. In all of the cases cited by the appellants, either there was no formula whatever or the formula did not reflect use of the highways.

The only other question to be answered with reference to appellants' contention that the Act of 1931 as amended violates the Commerce Clause is whether the amount of the tax is reasonable. The burden of proving that the tax is unreasonable is on the carrier: *Capitol Greyhound Lines v. Brice,* supra; *Clark, Director of Department of Motor Vehicles et al. v. Paul Gray, Inc. et al.,* 306 U. S. 583, and ap-

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immaterial whether the state places the fees collected in the pocket out of which it pays highway maintenance charges or in some other."

In the *Aero Mayflower Transit Co.* case, 332 U. S. 495, Mr. Justice Rutledge said at p. 504: ". . . Both before and after the Interstate Transit decision this Court has sustained state taxes expressly laid on the privilege of using the highways, as applied to interstate motor carriers, declaring in each instance that it is immaterial whether the proceeds are allocated to highway uses or others."

In *Clark v. Poor,* 274 U. S. 554, Mr. Justice Brandeis said at p. 557: ". . . It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the Commission in the administration or enforcement of the Act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs."

And in the *Dixie Ohio Co.* case, 306 U. S. 72, Mr. Justice Butler said at p. 77: ". . . The exaction is not to be deemed offensive to the commerce clause merely because the State, in the conduct of its fiscal affairs, chooses to use part or all of the proceeds for purposes other than the construction, improvement, or maintenance of its highways. . . ."

pellants have failed to carry that burden. It is true that the effect of that portion of the 1951 amendment which eliminated the credit for payment of local taxes and registration fees was the same as an increase in the amount of the tax which theretofore, because of those credits, was something less than eight mills. We do not regard a tax of eight mills on gross receipts apportioned to activities of interstate carriers within Pennsylvania as unreasonable, particularly since it has been held that an interstate carrier may be required to contribute toward the cost of construction of highways as well as their upkeep: *Clark v. Poor,* supra. The fact that one of the appellants or other marginal truck carriers will operate at a loss if the tax is applied, if true for that reason, does not establish that the tax is unreasonable.

None of the arguments advanced by the appellants is sufficient to show that the Act of 1931 as amended by the Act of 1951 is violative of the Commerce Clause of the United States Constitution.

Appellants also contend that the portion of the 1951 amendment which requires that the proceeds of the tax in question be placed in the General Fund violates Article IX, Section 18 of the Constitution of Pennsylvania. Article IX, Section 18, which was adopted in 1945, provides: "All proceeds from gasoline and other motor fuel excise taxes, motor vehicle registration fees and license taxes, operators' license fees and other excise taxes imposed on products used in motor transportation after providing therefrom for (a) cost of administration and collection, (b) payment of obligations incurred in the construction and reconstruction of public highways and bridges shall be appropriated . . . and used solely for . . . public highways and bridges and air navigation facilities and costs and expenses incident thereto . . . and shall not be diverted by transfer or otherwise to any other purpose, . . .". The amendment clearly and specifically enumerates the taxes intended to be covered by it and appellants recognize that a strict construc-

tion of this constitutional provision excludes a gross receipts tax on motor vehicle carriers for hire, and argue that the amendment must be construed in the light of common understanding and the form of the question which appeared on the ballot when the proposed amendment was approved by the voters. The question on the ballot was: "Shall the State Constitution be amended by adding Section eighteen to Article nine, requiring the revenues from taxes and license fees on gasoline, motor fuels, motor vehicles and operators and other products used in motor transportation, shall be used solely for highways, safety thereon, air navigation facilities, costs and expenses incident thereto; and permitting loans from such revenues to the Commonwealth only if repaid in the next fiscal year?". Appellants stress the words ". . . revenue from taxes . . . on . . . motor vehicles and operators . . .", and argue that the Act of 1931 imposed a gross receipts tax on operators of motor vehicles. But this argument proves too much and is self-defeating since the distinction between an owner's license and an operator's license is well known by almost all voters in Pennsylvania, and it cannot be said that by approving the amendment as the question appeared on the ballot the voters intended by the word "operators" to include owners of motor vehicles for hire. The tax in question is clearly not a tax on motor vehicles as such, nor is it a tax on "operators" as that word is commonly understood.

Appellants further contend that the tax in question violates the Equal Protection Clause of the United States Constitution, and the Uniformity Clause of the Pennsylvania Constitution. This contention is based in part upon appellants' erroneous construction of the statute which has been previously referred to and which requires no additional comment, and also upon the fact that the tax is applied to gross receipts arising from use of the Pennsylvania Turnpike for which a compensatory toll is also charged. Appellants argue that a carrier who uses the Turnpike for a given number of miles of its operation must pay a toll in

addition to the tax, whereas another carrier who operates for an equal number of miles but does not use the Turnpike pays only the tax, and therefore there is lack of uniformity in the operation of the tax. The Turnpike Commission holds the legal title to the Turnpike, but only in its capacity as an instrumentality of the Commonwealth: Act of May 21, 1937, P. L. 774, Section 4, 36 PS § 652d. The Turnpike is one of the public highways which cross the State of Pennsylvania in the same general locality. Two others are the William Penn Highway and the Lincoln Highway. No motor carrier is restricted to the use of the Turnpike to the exclusion of either of such other two routes. If a motor carrier voluntarily chooses to use the Turnpike because of more economic and efficient operation, such voluntary choice can not provide the foundation for a constitutional argument. The choice is obviously made because the amount of the toll is less than savings in operations resulting from a shorter route, few and very slight grades which make it possible to carry loads up to the legal limit, absence of intersections and savings in fuel and time. Appellant Interstate has not shown that the tax plus the toll exceeds fair compensation for its use of the Turnpike. A taxpayer can not voluntarily assume a burden and then be heard to say that it is unconstitutional. There is no merit in this contention.

Appellants' last contention is that the 1951 amendment violates the Fourteenth Amendment, or Due Process Clause of the United States Constitution, and Article I, Sections 1 and 9 of the Constitution of Pennsylvania, which together appellants construe to be the Pennsylvania due process requirement. This contention is based upon the retroactive effect of that portion of the 1951 amendment which had the effect of increasing the amount of the tax by eliminating the credits formerly allowed for registration fees and local use taxes. The amendment was approved on December 27, 1951, but the Act provides that it shall be applied to gross receipts for the calendar year 1951. The taxing power of

the Legislature is very broad and includes power to enact taxes which are retroactive in effect as well as the power to retroactively increase taxes. Many Pennsylvania cases have sustained the exercise of this power and the United States Supreme Court has approved retroactive taxes since *Stockdale v. The Insurance Companies,* 20 Wall. 323 (1874). In *Welch v. Henry et al.,* 305 U. S. 134, Justice Stone said at p. 148: ". . . For more than seventy-five years it has been the familiar legislative practice of Congress in the enactment of revenue laws to tax retroactively income or profits received during the year of the session in which the taxing statute is enacted, and in some instances during the year of the preceding session. See Untermyer v. Anderson, supra, footnote 1. [276 U. S. 440, 72 L. Ed. 645, 48 S. Ct. 353]. These statutes not only increased the tax burden by laying new taxes and increasing the rates of old ones or both, but they redistributed retroactively the tax burdens imposed by preexisting laws. This was notably the case with the 'Revenue Act of 1918', enacted February 24, 1919, 40 Stat. 1057, and made applicable to the calendar year 1918, . . .".

Even though the nature and amount of the increase in the tax could not have been anticipated, the retroactive effect of the 1951 amendment does not constitute a denial of due process under either the United States or the Pennsylvania Constitution.

We have considered all of the contentions made and authorities cited by appellants, but deem further discussion unnecessary.

The decrees of the court below which dismissed the complaint in each of these two cases are affirmed at the cost of the respective appellants.

Mr. Justice Bell files a dissenting opinion.

2

FILED
APR 27 1954
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 661

SPECTOR MOTOR SERVICE, INC., Petitioner,

v.

OTTO F. MESSNER, Secretary of Revenue of the Commonwealth of Pennsylvania, and WELDON B. HEYBURN, Auditor General of the Commonwealth of Pennsylvania.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

HARRY F. STAMBAUGH,
Special Counsel,
FRANK F. TRUSCOTT,
Attorney General,
Attorneys for Respondents.

State Capitol,
Harrisburg, Pa.

INDEX

PAGE

The argument of appellant that the Commonwealth is charging a carrier for the use of its highways upon the basis of the length of the physical route, and not upon the basis of miles traveled on such route, is unsound 3

The tax is imposed on miles operated, not on routes or according to the physical length of the respective routes 5

TABLE OF CASES

Canton Railroad Co. v. Rogan, 340 U. S. 511, 516 (1951) 5, 11

Capitol Greyhound Lines v. Brice, 339 U. S. 542, 547 (1950) 5

Central Greyhound Lines v. Mealey, 334 U. S. 653 (1948) 9

Commonwealth v. Brink's, Inc., 346 Pa. 296, 301 (1943) 6

Commonwealth v. Lehigh Valley Railroad Company, 1 Mona. 45 (1888) 7

Interstate Motor Freight System, Inc. v. Otto F. Messner et al., at No. 606 October Term, 1953... 2

Lehigh Valley Railroad Company v. Pennsylvania, 145 U. S. 192 (1892) 7, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 661

SPECTOR MOTOR SERVICE, INC., Petitioner,

v.

OTTO F. MESSNER, Secretary of Revenue of the Commonwealth of Pennsylvania, and WELDON B. HEYBURN, Auditor General of the Commonwealth of Pennsylvania.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

The petition states that the questions presented are as follows:

"(1) In administering a state statute purporting to levy a 'gross receipts tax' on interstate motor carriers, based on the proportion that the 'number of miles of routes operated in this Commonwealth' bears to the 'total number of miles of all routes operated', can a state administrative agency abandon that constitutionally objectionable formula and exact from an exclusively interstate motor carrier a 'gross receipts tax' based, not on the above formula provided in the statute, but on its own administra-

tively-created formula based on the proportion the 'number of miles that was traveled within Pennsylvania' bears to the 'total number of miles traveled interstate'?

"(2) Assuming that such a tax can constitutionally be assessed by the state administrative agency, can the tax base constitutionally include mileage traveled on a toll road, for all of which mileage the exclusively interstate carrier pays tolls into a fund out of which all costs of every kind incurred by the State and its agencies have already been, or will be, paid?"

The answer of these respondents to the second question is given in the Statement Opposing Jurisdiction pages 1-9, and again in "APPELLEES' REPLY TO APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM", pages 12-15, both of which were filed in *Interstate Motor Freight System, Inc. v. Otto F. Messner et al.* at No. 606 October Term, 1953. This Court denied the petition for certiorari in No. 606 on April 12, 1954.

This brief will, therefore, be devoted to the first question, with reference to the other briefs just cited for the second question.

The argument of appellant that the Commonwealth is charging a carrier for the use of its highways upon the basis of the length of the physical route, and not upon the basis of miles traveled on such route, is unsound.

Petitioner's attempt to construe Section 2 as imposing a tax upon the physical extent of routes rather than upon the number of miles traveled on such routes, was rejected by the Supreme Court of Pennsylvania in its opinion as follows:

> "* * * Such a construction is unwarranted. The title of the Act provides: 'Imposing a tax on gross receipts as an excise on the use of the public highways by certain owners or operators of motor vehicles transporting passengers and property for hire.' Use of the highways can be ascertained only from the number of miles operated, not from the physical layout of the routes. We adopt as correct the construction given to the statute by the Department of Revenue in administering the tax, that is, that the tax is based upon the number of miles operated, not the physical location and the extent of the routes. Cf. Commonwealth v. Brinks, Incorporated, 346 Pa. 296, 30 A. 2d 128." (375 Pa. p. 455)

Petitioner offered no proof whatever that the Legislature or the administrative officials or the courts of Pennsylvania, in construing this tax statute, intended in any way to avoid the commerce clause or any other constitutional provision. Interpretation of the statute by the Supreme Court of Pennsylvania, we submit, should, therefore, be accepted as conclusive.

The title of the Act of June 22, 1931, P. L. 694, 72 P. S. 2183, is as follows:

> "Imposing a tax on gross receipts as an excise on the use of the public highways by certain owners or operators of motor vehicles transporting passengers and property for hire."

It will be noted that the tax is imposed "on the *use* of the public highways".

The intent so declared is to impose the tax not on routes as such, but on the *use,* and use is measured by miles traveled.

Likewise, the title speaks of "owners or operators of motor vehicles *transporting",* not merely those having licenses for routes.

Section 2 of the Act of June 22, 1931, P. L. 694, 72 P. S. 2184, provides that the motor carrier shall file a report containing:

> "* * * (5) the number of miles of all routes over which such motor vehicle or motor vehicles shall have been operated by such company during the period for which the report is filed; (6) the number of miles within this Commonwealth of all such routes so operated during the period for which the report is filed; * * *"

This language shows clearly that the Department of Revenue is to get in this report the number of miles operated, not merely the physical length of each *route.*

The words "during the period for which the report is filed" also indicate that the report is to contain the total number of miles operated throughout the period.

The length of the routes would ordinarily remain constant during such period.

All of these requirements are in exact compliance with the provision at the beginning of Section 2 that "Each company shall pay an excise tax for the use of the highways of this Commonwealth. * * *".

The tax is imposed on miles operated, not on routes or according to the physical length of the respective routes.

(1) Section 2, at the beginning, expressly declares that each company shall pay a tax "for the use of the highway". The use of highways is measured by the number of miles operated or traveled. The length of a particular route would not indicate the amount of *use* thereof.

(2) The key word in defining the measure of the tax is *"miles"*, not "routes". The tax is imposed, not on "routes operated" but on *"miles* of routes *operated"*. The phrase means the number of *miles operated on or over routes*. This is the fair and reasonable construction.

The act does not say "the *length* of its line in this State", as in *Canton Railroad Co. v. Rogan*, 340 U. S. 511, 516 (1951).

In *Capitol Greyhound Lines v. Brice*, 339 U. S. 542, 547 (1950), Mr. Justice Black speaks of:

> "* * * such key factor as mileage * * *"

(p. 547)

This Court has also said that the purpose:

> "* * * may be indicated by the nature of the imposition, such as a mileage tax directly propor-

tioned to the use, Interstate Busses Corp. v. Blodgett, 276 U. S. 245, * * *". (Interstate Transit, Inc., v. Lindsey, 283 U. S. 183, 186 (1931)

(3) That the tax is not based upon routes operated, but upon miles operated, was ruled by this court in:

Commonwealth v. Brink's, Inc., 346 Pa. 296, 301 (1943)

In this case the company objected that it did not operate over any *route,* and, therefore, was not a carrier within the Act of 1931.

This objection was overruled. In the opinion Mr. Justice Drew said:

"* * * Appellant next resorts to the argument that it does not operate on schedules or over fixed *routes* and is not, therefore, within the class of carriers subject to the tax. Section 2 of the Act admittedly requires *a report of routes* and schedules if there are any, but *this requirement is obviously one imposed for the express purpose of facilitating proper administration of the act and eliminating tax evasion.* It does not mean that where there are none the carrier is not within the plain language of the statute. * * *" (Emphasis supplied) (p. 301)

Section 4 of the Act of 1931 further provides:

"Section 4. The said excise tax on gross receipts shall be settled, resettled, and otherwise imposed and adjusted in the same manner, within the same periods of time, and subject to the same penalties, interest, and right of resettlement, review, appeal, and refund, *as provided by law in the case of*

taxes on gross receipts." (695-696) (Emphasis supplied)

Before 1886 Judge McPherson in the Court of Common Pleas of Dauphin County, Pennsylvania, had established the practice of apportioning gross receipts of railroads according to the ratio of miles traveled in Pennsylvania to total miles traveled. His decision was affirmed by the Supreme Court of Pennsylvania in *Commonwealth v. Lehigh Valley Railroad Company,* 1 Mona. 45 (1888), and again affirmed by the Supreme Court of the United States in *Lehigh Valley Railroad Company v. Pennsylvania,* 145 U. S. 192 (1892).

These decisions definitely approved the apportionment of gross receipts according to the ratio of miles traveled in Pennsylvania to total miles traveled.

This practice was the method of "settlement * * * as provided by law in the case of taxes on gross receipts." The employment of miles traveled in the ratio provides a fair measure of the use of the highway.

The Pennsylvania Department of Revenue has adopted this construction in making assessment of tax under this statute. Since the enactment of the statute in 1931, the practice of the Pennsylvania Department of Revenue has been to apportion gross receipts according to miles traveled, not length of routes.

The form of gross receipts tax report for operators of motor vehicles for hire, under the heading "Computation of Tax By Taxpayer" requires the following data to be furnished:

"6. Interstate Operations

"a. The number of miles that was traveled within Pennsylvania ..... Miles.

"b. Total number of miles traveled Interstate, that is on trips partly inside and partly outside Pennsylvania ..... Miles.

"c. Total Gross Receipts from Interstate operations, that is, from the entire mileage shown in 6b $.....

"Less Gross Receipts received for carrying United States mail on interstate trips * * *"

The operator is not required to state the length of physical routes, whether operated or not. The only figures which he is required to furnish, and which the Department has before it when it makes an assessment, are "miles operated."

Section 3 provides that the tax shall be paid:

"* * * (1) In case of a company operating routes which are entirely within the limits of this Commonwealth, eight (8) mills upon the dollar upon the gross receipts of such company from all operations for the period covered by such report; and (2) in case of a company operating over routes when only a part of such route lies within this Commonwealth, eight (8) mills upon the dollar upon such portion of the gross receipts of such company as is represented by the ratio that the number of miles of routes operated in this Commonwealth by such company, during the period for which the report is filed, bears to the total number of miles of

all routes operated by such company during said period. * * *" (72 P. S. 2185)

In (2) as in (1), it is not routes but miles operated, we submit, which determines the numerator and the denominator of the ratio.

Here, as stated in Section 4 quoted *supra*, the Act of 1931 expressly provides the method of *apportionment* which has been approved by the Supreme Court of Pennsylvania and the Supreme Court of the United States.

Even if the intent were doubtful because of the use of the word "routes", such doubt is clearly removed by—

(a) The words in the title: "imposing a tax on gross receipts as an excise on the use of the public highways";

(b) The direction in Section 4 quoted supra that the tax: "be settled * * * as provided by law in the case of Taxes on Gross Receipts";

(c) The practice of the Pennsylvania Department of Revenue, applied uniformly since 1931, in apportioning gross receipts according to miles travelled, not length of routes.

In *Central Greyhound Lines v. Mealey*, 334 U. S. 653 (1948), a common carrier by motor vehicle operated buses from New York City to Buffalo, over a route, 42.53 percent of which was in New Jersey and Pennsylvania.

The Supreme Court held that New York could tax at two per cent the gross receipts from the transportation over this route, apportioned according to the mile-

age in New York. The portion was the fraction in which the mileage traveled in New York was the numerator and the total mileage was the denominator.

Mr. Justice Frankfurter said:

> "* * * On the record before us the tax may constitutionally be sustained on the receipts from the transportation apportioned as to the mileage within the State. * * *"

The court also referred to its earlier decision in *Lehigh Valley Railroad Co. v. Commonwealth,* 145 U. S. 192 (1892) in which the Supreme Court of the United States affirmed the decision of the Supreme Court of Pennsylvania, reported in 1 Mona. 45 (1888), and said:

> "* * * The trial court had found, as appears from the record, that the 'total receipts from this transportation, seven per cent. of which were collected by the Lehigh Valley Railroad Company at point of shipment and the remainder by the Pennsylvania Railroad Company at point of destination were apportioned between the companies upon a mileage basis — that is to say, each company's share was in the proportion that the number of miles carried by it bore to the total number of miles carried' * * *"

Petitioner has not produced any figures to prove that even a formula based entirely upon length of routes would *in fact* injure petitioner or discriminate against it or result in a higher tax than if the assessment were based on miles traveled, or would impose an unreasonable burden on interstate commerce. Petitioner's assertion of

unfairness in apportionment according to routes, rather than miles, does not prove itself.

Petitioner's complaint in equity averred merely

> "5. Plaintiff operates over routes traversing several states, including Pennsylvania, part of said routes in Pennsylvania being over the Pennsylvania Turnpike and its extension"

Petitioner nowhere specifies whether the part of the route or mileage over the Pennsylvania Turnpike would amount to 500 miles or 50,000 miles. In fact, some carriers do enter the Turnpike at Somerset, Pennsylvania and leave it at Bedford, Pennsylvania, after running about 30 miles, in order to avoid the haul over the Allegheny Mountain.

Nor does petitioner specify the number of routes which it travels. A trucking company doing exclusively interstate business as petitioner does, may follow a single route—often the Turnpike—uninterruptedly and invariedly, and would have to report only the length of this one route and would show abnormally small numerator and pay less tax than a carrier which was assessed according to the number of *miles* traveled.

This Court has sustained a statute in which the proceeds of interstate transportation were apportioned according to *length of line or route.*

In *Canton Railroad Co. v. Rogan,* 340 U. S. 511 (1951), a Maryland statute imposed a tax upon motor carriers

> "* * * 'upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line.' " (516, note)

The Supreme Court held that this tax was not in violation of the commerce clause.

Mr. Justice Douglas said:

> "* * * It is settled that a non-discriminatory gross receipts tax on an interstate enterprise may be sustained if fairly apportioned to the business done within the taxing state (see Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 255) and not reaching any activities carried on beyond the borders of the state. Where transportation is concerned, an apportionment according to the mileage within the state is an approved method. Greyhound Lines v. Mealey, 334 U. S. 653, 663." (515-516)

This tax was upheld although the carrier was not using public highways owned by the state, but was operating on a roadbed which the railroad company had provided at its own expense and owned. There was no use of a public highway and no basis for a charge for the use of the same. The charge was clearly for general revenue purposes.

However, as we have already stated, it is the position of the Commonwealth that the formula in the Pennsylvania statute is based on miles operated, and not on physical length of routes.

This formula has been applied and assessments made with consistency for the period of 22 years since the Act of June 22, 1931 became a law.

If the act should be construed as basing the apportionment on miles of routes, and not upon miles traveled, such a decision would change the formula which has been

applied and the assessments which have been made since the passage of the law of 1931.

Respectfully submitted,

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